APR 11 2003

No. 02-1205

IN THE

Supreme Court of the United States

EDITH JONES, *et al.*,

Petitioners,

v.

R.R. DONNELLEY & SONS COMPANY,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Seventh Circuit Court of Appeals correctly held that in a 1996 lawsuit brought under 42 U.S.C. § 1981 alleging race discrimination in termination of employment and maintenance of a racially hostile work environment, the personal injury statute of limitations of the forum state applies rather than the "catch-all" four-year statute of limitations codified at 28 U.S.C. § 1658.

CORPORATE DISCLOSURE STATEMENT

R.R. Donnelley & Sons Company has no parent company and no publicly held corporation owns 10% or more of its stock.

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STATEMENT OF THE CASE

Petitioners ask this Court to reconsider a decision of the United States Court of Appeals for the Seventh Circuit which held that Illinois' two-year personal injury statute of limitations, rather than the federal "catch-all" four-year statute of limitations provided in 28 U.S.C. § 1658, applied to Petitioners' claims under 42 U.S.C. § 1981.

Petitioners, former employees of Defendant's Chicago Manufacturing Division ("CMD"), filed their action on November 25, 1996 alleging employment discrimination in violation of Section 1981. Petitioners' Complaint asserts (as do their Amended Complaints): "This action arises under . . . The Civil Rights Act of 1871, as amended by The 1991 Civil Rights Act (Section 1981(b)); . . ."

The District Court certified three classes according to the type of discrimination claimed:

> "Class 1" alleging discriminatory termination and denial of transfers in the shutdown of the CMD;
>
> "Class 2" alleging discriminatory assignment to non-regular jobs and denial of promotions to regular full-time jobs at the CMD while it was in operation; and
>
> "Class 3" alleging racial harassment at the CMD and two other Divisions.

Defendant filed a Motion for Summary Judgment seeking dismissal of all claims by former CMD employees (including all Class 1 and 2 claims and the harassment claims of former

CMD employees in Class 3) on the ground that their action was filed more than two years after their termination of employment in connection with the CMD closing and was therefore time barred by the two-year Illinois personal injury statute of limitations. The District Court denied the Motion, ruling that Section 1658 applied to the Class 1 termination and Class 3 racial harassment claims (but not, as explained below, to the Class 2 assignment and promotion claims).

Section 1658 provides that the "catch all" statute of limitations is to apply prospectively to federal civil actions "arising under an Act of Congress enacted" after Section 1658's effective date, December 1, 1990, which do not have their own express limitations periods. The District Court reasoned that Petitioners' Class 1 and 3 claims "arose under" the Civil Rights Act of 1991 because these claims were not viable under this Court's decision in *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), which limited the applicability of Section 1981's "make and enforce contracts" language to hiring, *i.e.* contract formation discrimination, but became actionable by virtue of the passage of the 1991 Act, which expanded the definition of the "make and enforce contracts" language to include other terms and conditions of employment, *i.e.* post contract formation discrimination. App. 36a-38a. The District Court declined to apply Section 1658 to the Class 2 assignment and promotion discrimination claims pending further development of the facts and briefing by the parties as to whether those might have been actionable under *Patterson* and before the 1991 Act. App. 40a.

At Defendant's request, the District Court certified for immediate appeal pursuant to 28 U.S.C. § 1292(b) the following question:

> Whether in a 1996 lawsuit brought under 42 U.S.C. § 1981 alleging discrimination in termination of

> employment, and maintenance of a racially hostile work environment [*i.e.*, the Class 1 and 3 claims], the appropriate statute of limitations is the 'catch-all' four-year period enacted by Congress in 1990 and codified at 28 U.S.C. § 1658 or the personal injury statute of limitations of the forum state.

The Court of Appeals for the Seventh Circuit granted Donnelley's Petition and reversed the District Court. The Seventh Circuit concluded that all of Petitioners' Section 1981 claims "arose under," as used in Section 1658, the original "make and enforce" language of the Civil Rights Act of 1866 and not the new definitional provision of Section 1981(b) added by the 1991 Act saying:

> We now turn to the language, structure and history of § 1981 to determine whether, given the manifest intent of Congress in enacting § 1658, it is appropriate to apply the applicable state statute of limitations or the federal catch-all provision. We again begin with the language and the structure of the statute. The most salient feature of the revised statute is that § 1981(b) simply cannot stand on its own. An action to recover for discriminatory post-formation treatment simply cannot be based solely on § 1981(b). Indeed, without § 1981(a), § 1981(b) is meaningless. Consequently, although post-formation discriminatory claims depend on the amendatory language of § 1981(b) in the sense that the definitional language of that subsection makes clear that "make and enforce" includes post-formation conduct, the cause of action for post-formation conduct "aris[es] under" § 1981(a); that

subsection, not subsection (b), provides the actual right to recovery. 305 F.3d at 717.

Finding that Petitioners' claims arose under a pre-existing statute, the Seventh Circuit held that Section 1658 did not apply and reaffirmed the long-standing application of the analogous personal injury statute of limitations of the forum state to Section 1981 claims.

Petitioner's petition for *rehearing* and *rehearing en banc* was denied by the Court of Appeals and this Petition ensued.

REASONS FOR DENYING THE PETITION

I. The Seventh Circuit's Decision is Consistent with This Court's Decision in *Rivers v. Roadway*

Petitioners assert that the Seventh Circuit's decision conflicts "in principle" with this Court's decision in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994). But Petitioners fail to articulate exactly where the alleged conflict lies and there is none. *Rivers* holds that Section 101 of the Civil Rights Act of 1991, re-designating the preexisting Section 1981 as Section 1981(a) and adding the definitional Section 1981(b), does not apply retroactively. Although Petitioners assert that, in so holding, this Court "recognized . . . that § 1981(b) created an entirely new cause of action," this Court did not. Rather, this Court found that "§ 101 operates as a gloss on the terms 'make and enforce contracts,' the original language of the Civil Rights Act of 1866" which has the effect of imposing "new legal obligations." 511 U.S. at 303-305.

As *Rivers*, 511 U.S. at 304, and its companion decision, *Landgraf v. USI Film Products*, 511 U.S. 244, 283 (1994), make clear, the focus in determining whether to apply a statute retroactively is on whether doing so would impose new legal liabilities and obligations on past conduct. This inquiry is the same regardless of whether the statute is characterized as creating a new cause of action or as an amendment of a preexisting cause of action. *Landgraf*, 511 U.S. at 283. Accordingly, it was unnecessary for this Court in *Rivers* to address whether Section 1981(b) creates an "entirely new cause of action" and it did not.

Nor does the Seventh Circuit's decision conflict with any "principle" emanating from *Rivers*. The Seventh Circuit readily recognized, in concert with *Rivers*, that Section 101 of the 1991 Act made viable certain Section 1981 claims not actionable under *Patterson*. But the Seventh Circuit was also correct in holding that, as a matter of common sense, as well as statutory history and structure, Petitioners' claims "arise under" – i.e. "stem from" or "originate in" to use the District Court's definition (citing Black's Law Dictionary (7th Ed. 1999) – the 1866 Act's original "make and enforce" language rather than the Section 1981(b) definitional "gloss." Indeed, Petitioners' own Complaint language, asserting their "action arises under . . . The Civil Rights Act of 1871, as amended by the 1991 Civil Rights Act (Section 1981(b) . . ." reflects this reality.

Nothing in *Rivers* conflicts with this ruling or analysis. *Rivers* simply does not speak to the statutory construction issue presented here. If anything, to the extent *Rivers*' denial of retroactive effect for Section 101 is based on a concern not to upset settled expectations, the Seventh Circuit's decision is entirely consistent in that it preserves the

longstanding precedent of applying the most analogous state statute of limitations for personal injury tort claims to Section 1981 claims. *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 660-62 (1987); *Vakharia v. Swedish Covenant Hospital*, 190 F.3d 799, 807 (7th Cir. 1997), *cert. denied*, 530 U.S. 1204 (2000).

II. The Seventh Circuit's Decision is Consistent with the Language and Purpose of Section 1658

Petitioners further assert that the Seventh Circuit's decision is at odds with the "plain meaning" of Section 1658's language. But 1658 provides no "plain" and unambiguous meaning on the only point that matters in this case: whether for purposes of determining the applicability of Section 1658 a cause of action should be deemed to "arise under" an Act of Congress enacted after Section 1658's effective date where an action, as Petitioners' Section 1981 claims here, arises under an Act enacted before Section 1658 but amended thereafter. *See, e.g., Robinson v. Shell Oil Company*, 519 U.S. 337, 340 (1997) ("Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning *with regard to the particular dispute in the case*." (emphasis supplied)). As the Seventh Circuit correctly observed, Section 1658's language alone does not answer this question. 305 F.3d at 724, *Accord, Zubi v. AT&T Corp.*, 219 F.3d 220, 224 (3d Cir. 2000); *Madison v. IBP, Inc.*, 257 F.3d 780, 798 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 919 (2002).[1]

1. The Seventh Circuit also addressed and correctly ruled that the recent amendment to Section 1658 has no bearing on the issue presented in the instant Petition. 305 F.3d at 720 n.4. On July 30, 2002, Congress amended Section 1658 by adding a new subsection (Cont'd)

Because Section 1658 is equivocal, the Seventh Circuit appropriately turned to the structure, purpose and history of Section 1658, as well as Section 1981, to determine if Section 1658 applies to Section 1981 claims. As the Seventh Circuit recognized, Section 1658 was enacted to alleviate the uncertainty in the practice of borrowing analogous state statutes of limitations for federal causes of action without their own. But Congress stopped short of making Section 1658 applicable to all such federal causes of action accruing after Section 1658's effective date. Moreover, Congress clearly expressed why. Namely, it recognized that there was a well established precedent of borrowing state limitations periods for federal causes of action without their own limitations period and decided to preserve this body of law in the interest of avoiding the disruption of settled expectations based on that precedent:

> With respect to many statutes that have no explicit limitations provision, the relevant limitations

(Cont'd)
(b) which provides a statute of limitations for private rights of action claiming fraud under the Securities Exchange Act of 1934. As both the legislative history and the language of this amendment make clear, the new statute of limitations addresses and is designed to overturn this Court's decision in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 n.9 (1991), which ruled that an implied cause of action under Section 10(b) of the 1934 Act and Rule 10b-5 is subject to the statute of limitations in Section 9(e) of the 1934 Act, 15 U.S.C. § 78i(e). Contrary to Petitioners' contention, the amendment, therefore, does not address the case where a cause of action could be said to arise under two different statutes, one enacted before Section 1658 and the second thereafter. Likewise, absolutely nothing in the amendment's legislative history suggests Congress thought that § 1658 would otherwise apply to the long recognized Section 10(b) implied cause of action.

> period has long since been resolved by judicial decision, with the applicable period decided upon by the courts varying dramatically from statute to statute. Under these circumstances, retroactively imposing a four year statute of limitations on legislation that the courts have previously ruled is subject to [different limitations periods] would threaten to disrupt the settled expectations of a great many parties.

H.R. Rep. No. 101-734, § 111 at 24 (1990).

Similarly, the legislative history surrounding the amendment of Section 1981 makes clear that Congress was well aware of the established precedent under Section 1981 of borrowing the limitations period from state personal injury statutes. *See* H.R. Rep. No. 102-40(I) at 63, *reprinted in* 1991 U.S.C.C.A.N. at 601; H.R. Rep. No. 102-40(II) at 22 n.32, *reprinted in* 1991 U.S.C.C.A.N. at 715-16 n.32. In fact, Congress cited this practice as a reason to lengthen the Title VII statute of limitations to two years to bring it more into harmony with the longer limitations periods applied to Section 1981 claims. *Id.*

It would be anomalous indeed for Congress to cite this precedent approvingly in connection with the passage of the 1991 Act while *sub silentio* abrogating the same precedent through the joint operation of the 1991 Act and Section 1658. The Seventh Circuit's holding that Petitioners' claims arise under the original "make and enforce" language thereby preserving the Section 1981 precedent of borrowing the analogous state statute of limitations gives faithful effect to the balance struck by Congress in its passage of Section 1658.

Furthermore, the Seventh Circuit's review of Section 1658's legislative history as an aid in construing the statute, in these circumstances, is entirely consistent with this Court's precedent cited by Petitioners. *Norfolk & Western Ry. Co. v. American Train Dispatchers*, 499 U.S. 117, 128 (1991); *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980); *Robinson v. Shell Oil Co.*, 519 U.S. at 340-41. Those decisions provide that statutory analysis should not go beyond the language of the statute where the language is clear and unambiguous in its application to the question at hand and where there is no clearly expressed legislative history to the contrary. Here, neither condition pertains. As demonstrated above, not only is Section 1658's language susceptible to alternative textually plausible interpretations, but also the one chosen by the District Court is contrary to Congress' clearly expressed intent.

But even without resort to the legislative history behind Section 1658's enactment and accepting, *arguendo*, the District Court's reading of "arising under," as demonstrated above, the Seventh Circuit rightly found that for purposes of Section 1658, the structure and evolution of Section 1981 make manifest that Petitioners' 1981 claims "arise under" the original "make and enforce" language, now codified as Section 1981(a), rather than the definitional Section 1981(b).

III. The Seventh Circuit's Decision is Consistent with Congress' Intended Application of Section 1658

Petitioners' additional contention that the Seventh Circuit's analysis will improperly limit Congress' intended reach of Section 1658 is based on a mischaracterization of the Seventh Circuit's ruling and constitutes rank speculation as to its

application in other situations. Petitioners assert that the Seventh Circuit held that Section 1658 applies "only when Congress establishes a new cause of action and does not apply to statutes that have 'roots in' or 'otherwise reference' laws that preexist Section 1658" (Petition, p. 4). From this faulty premise, Petitioners speculate that the Seventh Circuit's reading of Section 1658 would render the statute "a virtual dead letter" as to any amendment of an existing statute.

In fact, the Seventh Circuit spoke much more precisely than Petitioners contend, stating that in the context of a post Section 1658 amendment to a pre-existing cause of action, "Section 1658, therefore, applies only when an Act of Congress creates a wholly new cause of action, one that does not depend on the continued existence of a statutory cause of action previously enacted and kept in force by the amendment." 305 F.3d at 726. As elucidated above, given the structure and history of Section 1981, the Seventh Circuit correctly held that the 1991 Act did not create such a "wholly new cause of action" and therefore Section 1658 did not apply to Petitioners' claims. But how the Seventh Circuit's formulation of Section 1658 would be applied in other circumstances is pure conjecture. Petitioners' own example, the Telecommunications Act of 1996 (Petition, p. 11), belies their assertions of an inappropriately stunted application. That Act created for the first time a private right of action, codified at 47 U.S.C. § 252(e)(6), to enforce an entirely new regulatory scheme for negotiating and arbitrating interconnection agreements. There is nothing in the Seventh Circuit's reading of Section 1658 which would deny its application to the new cause of action in 42 U.S.C. § 252(e)(6). And, in any event, that question is not presented in this Petition.

IV. Neither 42 U.S.C. § 1988 Nor This Court's Decisions In *Wilson v. Garcia* and *North Star Steel Co. v. Thomas* Supports Review

Petitioners' assertion that this Court's decision in *Wilson v. Garcia*, 471 U.S. 261 (1985), and 42 U.S.C. § 1988 mandate the application of Section 1658 to Section 1981 claims begs the question at issue and offers no independent basis for granting certiorari. *Wilson* reaffirmed the "settled practice" of applying state limitations periods to federal civil rights causes of action which do not provide their own statute of limitations. 471 U.S. at 266-67. This Court went on to direct the lower courts to adopt state limitations periods only after first considering whether there is any applicable federal law. 471 U.S. at 267. As shown above, the Seventh Circuit did just that and applied the Illinois state personal injury statute of limitations only after correctly determining that Section 1658 does not apply.

This Court's decision in *North Star Steel Co. v. Thomas*, 515 U.S. 29 (1995), is not to the contrary. There, this Court reaffirmed the long-standing presumption of borrowing the most analogous state statute of limitations for federal causes of action without their own. In passing, this Court noted in a footnote that this presumption would be reversed for such statutes enacted after the effective date of Section 1658. 515 U.S. at 34 n.1. No issue of interpretation or application of Section 1658 was before this Court in *North Star Steel Co.*, let alone the issue presented here. In sum, neither *Wilson* nor *North Star Steel Co.* add anything to the analysis of whether Section 1658 applies to Section 1981 claims.

V. Review Is In Any Event Premature

As discussed above, the Seventh Circuit's decision is correct, consistent with this Court's precedent and faithful to the language, structure and history of both Sections 1658 and 1981. The decision, in short, presents no grounds for review. Nor is review warranted or advisable to resolve the current conflict among the Circuit Courts of Appeals.

At present, only four Courts of Appeals have ruled on whether Section 1658 rather than the appropriate state personal injury limitations period applies to claims under Section 1981. The Seventh Circuit, as well as the Third and Eighth Circuits, holds that Section 1658 does not apply. *See Zubi v. AT&T Corp.*, 219 F.3d 220 (3d Cir. 2000); *Madison v. IBP, Inc.*, 257 F.3d 780 (8th Cir. 2001), *vacated on other grounds*, 536 U.S. 919 (2002).[2] Only the Tenth Circuit, in *Harris v. Allstate Insurance Co.*, 300 F.3d 1183 (10th Cir. 2002), *rehearing* and *rehearing en banc denied* November 26, 2002, has held otherwise. A grant of review at this time is premature because this Court will benefit from further consideration of and elaboration on this issue by other Courts of Appeals. As Petitioners themselves point out, the other Courts of Appeals have not yet been presented with cases squarely raising the issue but, given the number of

2. In *Madison*, plaintiffs brought claims under Title VII of the Civil Rights Act of 1964, and Section 1981. This Court vacated the *Madison* decision in light of its decision in *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101 (2002), with respect to the Eighth Circuit's application of Title VII's statute of limitations to plaintiffs' Title VII harassment claims. This Court did not pass judgment on, or otherwise call into question, the Eighth Circuit's reasoning with respect to its holding that Section 1658 did not apply to plaintiffs' Section 1981 claims.

recent District Court decisions (many of which are cited by Petitioners), such consideration will almost certainly be forthcoming. Indeed, oral argument on the application of Section 1658 to Section 1981 claims was heard by the Fourth Circuit Court of Appeals on October 30, 2002 in the cases of *James v. Circuit City Stores*, Docket No. 02-1256, and *Moten v. Circuit City Stores*, Docket No. 02-1257. Moreover, oral argument on the same issue is set on May 13, 2003 before the Ninth Circuit Court of Appeals in *Abazly v. Pinnacle Nissan, Inc.*, Docket No. 02-15511.

Further development of the issue is particularly appropriate here. As the Third Circuit recognized in *Zubi*, 219 F.3d at 222, the District Courts have applied three interpretations of Section 1658's application to Section 1981 claims: (1) Section 1658 does not apply to any Section 1981 claims; (2) Section 1658 applies only to those Section 1981 claims which could not have been brought under *Patterson* and prior to the 1991 Act; and (3) Section 1658 applies to all Section 1981 claims. The Seventh, Third and Eighth Circuits have adopted the first reading; the Tenth Circuit has followed the second interpretation. Although, Defendant submits that subsequent rulings will confirm the correctness of the Seventh Circuit's position, denying review at this time will provide the opportunity for a more robust consideration of all three competing interpretations.

This case also is not an efficacious vehicle for resolving this conflict. Contrary to Petitioners' assertion, the District Court did not rule that all their claims were timely under Section 1658's four-year limitations period. Instead, the District Court reserved ruling on Petitioners' discriminatory assignment and promotion claims for further development of the facts and briefing on whether such claims would have

been actionable before the 1991 Act. Answering that question requires extensive factual and legal analysis under the District Court's formulation of Section 1658 because even after *Patterson* and before the 1991 amendment, the Seventh Circuit interpreted Section 1981 as allowing claims of promotion discrimination where the promotion would alter the contractual relationship between the employee and employer such as in a move from a casual to regular employee. *See, e.g., Harper v. Godfrey Co.*, 45 F.3d 143, 146-47 (7th Cir. 1995). Under the District Court's interpretation, if the former CMD employee promotion claims would have been cognizable under *Harper*, the state statute of li itations, not Section 1658, would apply.

Accordingly, granting review without an established record illuminating the application of the District Court's reading of Section 1658 to all claims would deprive this Court of a full assessment of whether that interpretation will further the objective of bringing a greater degree of certainty in applying state statutes of limitations to federal causes of action without their own.

CONCLUSION

For the reasons stated, the Petition for Certiorari should be denied.

Respectfully submitted,

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